BLEED THROUGH – POOR COPY

FILE COPY

FILED
JAN 21 1948

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

MOTION, AFFIDAVITS AND BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

CLAUDE D. STOUT,
Milton, Wisconsin,

GEORGE S. GEFFS,
JACOB GEFFS,
ELI BLOCK,
Janesville, Wisconsin,
Counsel for Appellant.

Midwest Law Printing Co., 340 W. Huron St., Chicago

BLEED THROUGH – POOR COPY

INDEX.

PAGE

Motion to Deny Appellees' Motion to Dismiss Appeal 1

Affidavit of Lawrence Dyer 2

Affidavit of H. J. Burger 10

Argument 12

Introductory Statement 12

1. Appellees are not entitled to Dismissal of case upon their own ex parte action 13

2. Appellees have placed in Issue in this controversy the Rights of the public 16

3. The Parties to this Litigation and the Public are Entitled to Declaratory Relief 19

4. To Dismiss the appeal would result in an injustice to Appellant 21

CASES CITED.

Lafayette Dramatic Productions v. Ferentz, 305 Mich. 193, 9 N. W. (2d) 57, 66, 145 A. L. R. 1158, 1170 20

Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345, 348, 77 L. Ed. 730, 87 A. L. R. 1191 19

Payne v. Jones, 193 Okl. 609, 146 P. (2d) 113 17

Southern P. T. Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310 13

STATUTES CITED.

Federal Statutes, 28 U. S. C. A. Sec. 400; Mar. 3, 1911, C. 231, Sec. 274 d, as added June 14, 1934, C 512, 48 Stat. 955 and amended Aug. 30, 1935, C. 829, Sec. 405, 49 Stat. 1027 19

Wisconsin Statutes, Section 269.56 19

TEXTS CITED.

3 Am. Jur. "Appeal and Error" page 310, Sec. 733 17

132 A. L. R. page 1186 17

BLEED THROUGH = POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

MOTION TO DENY APPELLEES' MOTION TO DISMISS APPEAL.

Now comes the appellant and moves the Court to deny appellees' motion to dismiss the appeal upon the ground that the cause is moot.

CLAUDE D. STOUT,
Milton, Wisconsin,
Attorney for Appellant.

GEORGE S. GEFFS,
JACOB GEFFS,
ELI BLOCK, of
McGOWAN, GEFFS, GEFFS & BLOCK,
Janesville, Wisconsin,
Of Counsel.

Dated: January 8, 1948.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 275

LAWRENCE DYER,

Appellant,

vs.

CITY COUNCIL OF THE CITY OF BELOIT, ROCK COUNTY, WISCONSIN; A. D. TELFER, as City Manager of the City of Beloit, Rock County, Wisconsin; R. H. CALLAND, as City Clerk of the City of Beloit, Rock County, Wisconsin; and STANLEY J. GOLDSCHMIDT, City Sanitarian of the City of Beloit, Rock County, Wisconsin,

Appellees.

AFFIDAVITS IN OPPOSITION TO MOTION TO DISMISS APPEAL.

State of Wisconsin,
County of Rock—ss.

Lawrence Dyer, being first duly sworn upon oath deposes and says:

That he is the appellant in the above entitled action and that he makes this affidavit in opposition to the appellees' motion to dismiss the appeal on the ground that the above entitled suit has become moot.

That the suit has not become moot but that there is an actual controversy existing between parties upon the question of the right of the appellant to sell milk in the City of Beloit, which is pasteurized at a plant not located

BLEED THROUGH = POOR COPY

within six miles from the intersection of State Street and E. Grand Ave., in the City of Beloit.

That on December 15, 1947 the City of Beloit amended its ordinance to the extent of providing that the six mile limitation should not apply as to pasteurized milk within the course of interstate commerce and on the 16th day of December, 1947 issued to this appellant a temporary license which expires on June 30, 1948 "unless previously relinquished or revoked."

That the said license is "subject to the ordinances thereof and to the laws of this State."

That the said license and ordinances of the City of Beloit do not permit this appellant to sell or distribute milk within the course of intra-state commerce.

That the appellees in their brief served on the appellant on December 2, 1947 and filed in this Court maintain that they have a right to exclude all milk regardless of whether or not it arises within the course of interstate commerce that is pasteurized in plants not located within six miles from the intersection of State Street and East Grand Avenue in the City of Beloit; that the appellant contends in his brief that the City of Beloit has no such power under the Constitution of the United States; that the appellees still contend that the City of Beloit has such legislative power;

That the City of Beloit can repeal or change the amendment of December 15, 1947 at will and this appellant has no means or assurance that he will receive constitutional protection of his right of contract, property rights, investment and right to do business in the absence of a decision by this court; that a dismissal of this case will leave in full force and effect the decision of the Supreme Court of Wisconsin and the City of Beloit can amend

its ordinance at will and exclude the appellant from selling milk within the City of Beloit and appellant verily believes that the City of Beloit will immediately do so in the event this appeal is dismissed.

That a dismissal of this case would leave undecided the controversy between the parties as to the legislative right of the City of Beloit to arbitrarily exclude all milk pasteurized outside of the six mile zone.

That the amendment of December 15, 1947 was enacted by the City of Beloit for the purpose of avoiding a decision in this case; that the following history of the case demonstrates that new litigation would immediately arise:

That when this appellant first made inquiry in January of 1946 about securing a license to sell Dean Milk Company's milk in the City of Beloit that the following proceedings were had in the City Council of Beloit as reported by the Beloit Daily News, a newspaper published in Beloit, Wisconsin under the date of Feoruary 5, 1946:

Beloit Daily News, Tuesday, February 5, 1946
Farmers Ask Protection of Milk Market.

"Dairy farmers in the Beloit area are supplying this city with an adequate supply of good clean milk, their representatives told Beloit councilmen last night and, they asked that councilmen act to restrict the distribution of fluid milk here by outside interests.

Want Interests Protected.

Approximately 50 dairy farmers of this vicinity in Rock and Winnebago counties attended the council session held last night. They attended because of re-

BLEED THROUGH – POOR COPY

ports that a large distributor of fluid milk may be interested in locating a branch of its business here. The dairy representatives clearly explained they are of the pointed out, 'representatives of forced, and that their interests should be protected.

Ira Inman made the opening remarks for the delegation of farmers, 'We have here,' he pointed out, 'representatives of producers who furnish Beloit with fluid milk. We want to hold the fluid milk market here for ourselves.

'It is customary in Wisconsin to protect the market in Wisconsin cities, and when Wisconsin cities have been given good service, to discourage outsiders. Beloit is getting good, clean milk and good service.

'The issue sums up to this: we are fighting for interests we believe are ours.'

Milk Ordinance Is Strict.

Beloit has a milk ordinance which demands high quality milk for consumers here. It is strict in its demands for cleanliness, and the ordinance is made doubly effective by rigid inspections of producers and dairies by the city's inspection department and special sanitarians.

Answering the dairymen present last night, City Manager A. D. Telfer asserted 'We have the best milk ordinance in Wisconsin, and a strict inspection service.'

Explaining that there are limits to the area in which inspection service can be maintained, the ordinance calls for supplies from dairy farmers within a radius of six miles from Beloit. 'We intend to maintain and enforce the ordinance.' Telfer said.

Councilman A. J. Wagner remarked the Bacteria count in milk mounts if milk is transported a considerable distance. Councilman John Wootton questioned the ability of the ordinance to protect area

farmers, and City Attorney Clarence Haugan explained the radius limit. Councilman Maurice Christensen declared, 'We will go along 100 per cent with the dairymen in this area.'

Several Farmers Speak.

Dairy farmers and others who spoke briefly were Everett Sharpe, Winnebago county; George Holmes and Lyle Daniels of Turtle Grange; Fred H. Eddy, Beloit township farm bureau; Everett Phelps, Rockton township, and president of the Winnebago county farm bureau, and Frank McKearn. All expressed appreciation for the cooperation of councilmen.''

That thereafter the appellant filed an application for milk license and on June 3, 1946 his application was denied by the City Council of the City of Beloit on the sole ground that the milk which he proposed to deliver to the City of Beloit was not pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave. in the City of Beloit.

That due to the fact that the licensing year begins on July 1 and in order to avoid objection that the appellant's action would be moot the appellant made another application on August 29, 1946 which application was rejected by the City Council of Beloit on August 30, 1946; that the appellant filed a petition for Writ of Mandamus on September 25, 1946; that the appellees filed a return to the petition for Writ of Mandamus and alleged in the said return that if a license was granted to the appellant it would be necessary for the City of Beloit to employ a third inspector merely for the purpose of performing the additional work due to the issuance of the license to the petitioner; that the supply of milk now delivered to the Beloit dairy plants far exceeds the local demands, and that a great part of the milk produced in the rural areas

immediately surrounding Beloit is shipped from Beloit to other places for consumption. (R. 4)

That the appellees contended in the Circuit Court that to grant the license to the appellant would cause unreasonable additional expense to the City of Beloit (R. 5); and that the Circuit Court denied the petitioner relief and held that the City had constitutional authority to exclude milk which was not pasteurized in plants located in the 6 miles zone from the intersection of State Street and E. Grand Ave. in the City of Beloit; this decision was rendered December 7, 1946.

That the appellant appealed the case to the Supreme Court of the State of Wisconsin; that in the appellee's brief filed with the Supreme Court of the State of Wisconsin the appellees stated:

> "Neither the purpose nor the effect of the ordinance is to erect a trade barrier, unless it can be argued that the restriction prevents the 'lone wolf' operator, who may buy milk at some pasteurization plant at a greater distance than six miles, from delivering it into Beloit for local consumption. The appellant in this case does not operate a pasteurization plant (Ap. 111). He testified that he intended to buy milk from a plant at Chemung, Illinois, a distance of twenty-five to thirty-five miles from Beloit (Ap. 110), and deliver the milk by truck to Beloit retail stores. If he received a license, there is nothing to prevent him from purchasing milk at a plant located at a greater distance from Beloit. It is obvious that, under the ordinance, he is the only kind of an operator who will be affected by the restriction. * * *
>
> There are at present eight plants furnishing milk to Beloit (Ap. 115). It would be unfair to require these plants to stand the additional expense of $2,400.00 to $3,000.00 per annum, merely for the purpose of permitting the appellant to haul a truck load of milk to the Beloit retail stores each day, and

it would be unfair to throw the burden of the additional expense upon the Beloit taxpayers. In addition, others like the appellant may wish to haul milk from other creameries even more distant from Beloit than Chemung, and from different directions. The cost to the City of inspecting the farms surrounding several distant pasteurization plants would become prohibitive. Unless there is to be a complete breakdown in the inspection service, which the city desires to render to its citizens, there must be some practical and realistic limitation."

That in this Court the appellees have filed a brief in which it is contended that to grant a license to the appellant would place an additional burden upon the City of Beloit in the amount of $3000.00 a year (Appellees' Brief page 14); and it is stated:

"If the City is to be compelled to open its doors to every such dealer, no matter from whom he purchases, or at what distance, there will be an inevitable break-down in the inspection service which the municipality has a duty to render to its citizens."

That the Supreme Court of Wisconsin upheld the validity of the 6 mile zone in its decision of June 10, 1947; that the appellant promptly appealed this case to the Supreme Court of the United States on July 30, 1947; that the appellant had a Statement of Jurisdiction and a Brief prepared by his attorneys for the benefit of this Court and at a considerable expense to himself which Statement and Brief were filed in this Court; that it was stipulated that the cause should be submitted to this Court upon the briefs of the parties; that the appellees served their brief upon the appellant on December 2, 1947; that this Court had taken this case under advisement and was considering its decision and without solicitation on the part of the appellant the appellees on December 15, 1947 amended the city milk ordinance to the effect that the 6 mile zone did not apply to milk within the course of interstate commerce.

BLEED THROUGH – POOR COPY

That prior to this amendment of December 15, 1947 the Court Librarian of this Court inquired of the City of Beloit as to the history and background of this ordinance; that upon information and belief the appellant believes and states the facts to be that the said inquiry has not been answered by the City of Beloit for the reason that it has no minutes or history of the origin of the part of the ordinance that is in dispute in this case; that it is common knowledge that the provision for the 6 mile zone was enacted for the purpose of protecting local plants and to exclude competition from outsiders.

That the question before this Court is one of great public interest; that a number of other cities in Southern Wisconsin, Northern Illinois, and Northern Indiana have enacted similar ordinances for the purpose of protecting local pasteurizing plants against outside competition.

That appellant has been engaged in litigation for a year and a half and with great expense to himself in attempting to obtain his constitutional rights; that the action of the City of Beloit at this late date is for the purpose of preventing the appellant from obtaining a decision upon the controversy now existing between the parties; that the appellant is a person of modest means and is compelled to work for his livelihood in supporting himself and his family; that this litigation has been expensive and the action upon the part of the City of Beloit over the period of the last two years has caused great damage to this appellant for which there is no redress in law because the City was acting within a governmental function; that to permit the City's action at this late date to avoid a decision in this case would work a great hardship upon this appellant and would take away from him all means of determining his Constitutional rights and protection of his right to engage in

business, and his property rights which are necessary in making a livelihood for his family.

Lawrence Dyer

Subscribed and sworn to before me this 6th day of January, 1948.

Jacob Geffs
Notary Public, Rock County, Wisconsin.

My Commission Expires: April 1, 1951.
(Seal)

State of Wisconsin,
Rock County—ss.

H. J. Burger being first duly sworn upon oath deposes and says:

That he is and has been for four years sanitary inspector for the City of Janesville, Wisconsin;

That on June 24, 1946 the City of Janesville, Wisconsin adopted in substance the model milk ordinance and code promulgated by the United States Public Health Service and prepared by direction of the Surgeon General of the United States and that said ordinance provides for reciprocal milk inspection;

That after the enactment of this ordinance a milk license was granted to a dealer who obtained his milk beyond what had formerly been the limits of routine inspection of the City of Janesville, Wisconsin;

That this ordinance has been beneficial in improving the sanitation, grade and quality of the milk sold in the City of Janesville, Wisconsin; and that reciprocal inspection has not subjected the citizens of Janesville, Wisconsin, to impure milk and has not shown any tendency toward a breakdown of inspection maintained by this municipality;

That the City of Janesville, Wisconsin, is a city of approximately the same size of Beloit, Wisconsin and located twelve miles north of Beloit, Wisconsin.

H. J. Burger

Subscribed and sworn to before me this 6th day of January, 1948.

Jacob Geffs
Notary Public for Rock County, Wis.

My Commission expires: April 1, 1951.
(Seal)

ARGUMENT.

INTRODUCTORY STATEMENT.

Appellees have moved to dismiss the appeal upon the sole ground:

> *"That because of the enactment of the amended ordinance, as aforesaid, the above entitled suit has become moot."*

The ordinance before amended read:

> "(2) No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and E. Grand Ave., in the City of Beloit."

The ordinance after amendment read:

> "No pasteurized milk shall be sold in the City of Beloit which shall not have been pasteurized in approved plants within six miles from the intersection of State Street and East Grand Avenue in the City of Beloit; provided, however, that this provision shall not be construed to prohibit the sale within the city of pure, wholesome, pasteurized milk within the course of interstate commerce, if it affirmatively appears that such milk shall be produced, processed and transported under laws, regulations or ordinances equivalent to the requirements of this ordinance. The health officer shall have the right to satisfy himself that the health officer having jurisdiction over the processing and transportation of such milk is properly exercising a regulatory control."

This amendment was enacted December 15, 1947, almost two years after appellant had first applied for a milk license, and after a year and one-half of litigation.

This amendment can be repealed or modified at any time by the City of Beloit.

The appellees have not confessed error in this Court; they still contend that the City's original ordinance (which can be restored at any time) was and is a valid piece of legislation. This was and is disputed by appellant. The controversy still exists although appellant may not need the same relief as originally prayed.

I.

Appellees are not entitled to dismissal of case upon their own ex parte action.

Appellees base their motion upon the sole ground that the enactment of the amended ordinance has caused the suit to become moot.

In *Southern P. T. Co.* v. *Interstate Commerce Commission*, 219 U. S. 489, 31 S. Ct. 279, 55 L. Ed. 310 this Court held that an appeal from a decree dismissing a suit to enjoin the enforcement of an order of the Interstate Commerce Commission requiring a carrier to desist from granting a shipper an alleged undue preference over his competitors will not be dismissed as presenting merely a moot case because the time during which such order was by its express terms to continue in force has expired. On page 514 Mr. Justice McKenna stated:

> "It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is

hence contended that the order of the Commission has expired, and that, the case having thereby become moot, the appeal should be dismissed.

This court has said a number of times that it will only decide actual controversies, and if, *pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed. Jones* v. *Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Re. 611, and *Richardson* v. *McChesney*, decided November 28 of this term, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Re. 43. But in those cases the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and *Boise City Irrig. & Land Co.* v. *Clark* (C. C. App. 9th C.) 65 C. C. A. 399, 131 Fed. 415.

In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), *and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress.*

In *United States* v. *Trans-Missouri Freight Asso. supra*, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was

BLEED THROUGH – POOR COPY

an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: 'The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future. * * * Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above recited. The defendants cannot foreclose those rights, nor prevent the assertion therof by the government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case.' And, referring to the agreement as one claimed by the government as illegal, it was further said: 'That question the government has the right to bring before the court and obtain its judgment thereof.' The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached; and that the government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy, or terminate its questions.

In *Boise City Irrig. & Land Co.* v. *Clark, supra,* the period for which a municipal ordinance fixed a

water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: 'But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and *partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.*'

The motion to dismiss is denied." (Italics ours)

II.

Appellees have placed in issue in this controversy the rights of the public.

In the case at bar appellees state on page 12 of their brief:

> "If the city is to be compelled to open its doors to every such dealer (the appellant), no matter from whom he purchases, or at what distance, there will be an inevitable breakdown in the inspection service which the municipality has a duty to render to its citizens."

That assertion places in issue in this case the rights of the public. And as stated by Justice McKenna in the above quotation:

> "'Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above recited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case.'"

Payne v. *Jones*, 193 Oklahoma 609, 146 P. (2d) 113 was a suit by a former owner to enjoin a tax resale by the County Treasurer. On page 116 of the Pacific Reporter the Court stated:

> "While it is a general rule in this jurisdiction, as well as other jurisdictions, that the Courts will not ordinarily decide moot questions, this rule applies generally to private rights, and not always as to them, *but an exception is recognized in cases involving public rights,* and another exception is sometimes made when the question of the assessment of costs is involved. 4 C. J. 575, §2383, notes 81, 82, 94; 4 C. J. S., Appeal and Error P. 1945, §1354, notes 24, 45; §Am. Jur. 308, 310, §733, notes 10 and 13." (Italics ours.)

In 3 Am. Jur. "Appeal and Error" page 310 Section 733 the authors state:

> "It is not every change in circumstances which might be said to render the case a moot one so as to require a dismissal of the appeal or error proceeding, however. *Thus there will be no dismissal where the question involved is a matter of public interest;* whenever the judgment, if left unreversed, will preclude the party against whom it is rendered as to a fact vital to his rights, even though the judgment, if affirmed, may not be directly enforceable by reason of a lapse of time or change of circumstances; where the parties, by stipulation, preserve their rights to a review proceeding; and where the appellant has become liable for costs or other damages if the case is not reversed." (Italics ours.)

In 132 A. L. R. at page 1186 the authors state:

> "The proposition that an appellate court may retain an appeal for hearing and determination if it involves questions of public interest even though it has become moot so far as the parties or the particular action are concerned or though the parties desire that it be dismissed, is supported, either directly or by implication, by the great weight of authority.
> • • •

Statements in the cases to this effect include the following:

> • • • 'A case is not moot where interests of a public character are asserted under conditions which may be immediately repeated, merely because the time for a particular order has expired.' *Van de Vegt* v. *Larimer County* (1936) 98 Colo. 161, 55 P. (2d) 703.
>
> • • • 'Even though litigation may not be effective in all respects because of circumstances arising after appellate proceedings are taken, the appellate court does not thereby lose jurisdiction of the cause, and it may be retained for the determination of questions *properly presented involving the duties and authority of public officials* that are of general interest to the public.' Syllabus by the court in *State ex rel. Railroad Comrs.* v. *Southern Teleph. & Constr. Co.* (1913) 65 Fla. 67, 61 So. 119.
>
> • • • 'Appellate courts, as a rule, decline to decide questions which have become moot • • • Where, however, the matter in controversy appears to be one of 'great public interest' *and involves the 'authority and power' of public officials, the appeal will not be ignored as a moot question.' North Dakota Wheat Growers Asso.* v. *Moore* (1925) 52 N.D. 904, 204 N. W. 834.

We submit that after battling the appellant through the State Courts and into the Supreme Court of the United States on the proposition that the City of Beloit had a duty to protect its citizens against impure milk and that the only method by which that protection could be maintained was by fencing out everyone beyond the six mile limit that the appellees are in no position to deny that important rights of the public are involved, and that it is their duty as trustee for their citizens to ascertain their constitutional authority as public officials in the matter.

III.

The parties to this litigation and the public are entitled to declaratory relief.

Both the Wisconsin Statutes (Wisconsin Statutes Section 269.56) and the Federal Statutes (28 U. S. C. A. 400; Mar. 3, 1911, C. 231, Section 274 d, as added June 14, 1934, C. 512, 48 Stat. 955 and amended Aug. 30, 1935, C. 829, Section 405, 49 Stat. 1027) provide that the Courts may declare the rights of the parties "whether or not further relief is or could be prayed."

The fact that the City of Beloit has granted Appellant a temporary license which would make unnecessary at the present time the issuance of a Writ of Mandamus does not deprive the Appellant and the public of their right to have their rights declared in this controversy.

Assume that appellant had started an action under the Wisconsin Declaratory Judgments Act instead of a Mandamus action no one would contend that the Appellees after proclaiming their right and duty to fence outsiders out for two years and without abandoning such contention could defeat the action by merely granting the appellant a temporary license. The fact that appellees amended their ordinance for the time being in order to execute the *coup d' etat* does not strengthen their position. The procedure is one of form rather than substance and one wholly within the power of the appellees to change at will.

In *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 348, 77 L. Ed. 730, 736, 87 A. L. R. 1191, brought under the Declaratory Judgments Act of Tennessee to secure a declaration that a tax levied on the storage of gasoline was invalid as applied to appellant, Justice Stone declared:

"But the Constitution does not require that the case or controversy should be presented by traditional forms of precedure, invoking only traditional remedies. * * * It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. * * * As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial."

In *Lafayette Dramatic Productions* v. *Ferentz*, 305 Mich. 193, 9 N. W. (2d) 57, 66, 145 A. L. R. 1158, 1170, the Court stated:

"During the pendency of this appeal defendants filed motion in this court to dismiss the appeal, alleging that the contract for the employment of musicians for the period of one year had been fully performed and that the questions involved had, therefore, become moot. In such motion defendants further alleged in substance that the parties had entered into a new contract that was being amicably fulfilled. Plaintiff filed answer to such motion, denying that the questions regarding the validity of the contract have become moot and in substance alleging that plaintiff has been forced by duress and coercion to continue the contract in question for a further period of time.

We have before us on this appeal only the questions relating to the original or first contract for one year. Notwithstanding such questions and the issues presented by this record might be considered moot,

BLEED THROUGH – POOR COPY

we deem the case of sufficient importance to warrant our decision, even though it may be in the nature of a declaratory decree."

IV.

To dismiss the appeal would result in an injustice to appellant.

Appellant's affidavit and the record show that appellees have a callous disregard for appellant's constitutional rights.

To dismiss this appeal means that the decision in the Supreme Court of Wisconsin would stand in full force and effect which subjects appellant and his business to the tender mercies of the appellees. In the Supreme Court of Wisconsin appellees belittled the appellant, and stated that Beloit should not be put to additional expense so that he could haul a truck load of milk to the Beloit retail stores each day. They refer to him as a "lone wolf."

It stands to reason that if appellees are sincere in their contentions that to permit appellant to do business in Beloit will result in great expense to the City and breakdown of its inspection standards, that upon the dismissal of this appeal appellant will be immediately excluded from selling milk in the City.

That the appellees' fear of additional expense and breakdown of its inspection service is groundless, is shown by the affidavit of the sanitary inspector for the City of Janesville, Wisconsin and the fact, which is common knowledge, that thousands of cities in America have relied safely for years upon reciprocal inspection. The appellees must be thoroughly acquainted with this fact

as it is common knowledge. In fact such can be inferred from their action of December 15, 1947. But appellees' conversion upon the eve of a decision of this Court is not indicative of good faith. Why all this anxious attempt at the last minute to get the appeal dismissed? How can a decision, regardless of results, hurt the appellees if they have no intention of not going back to the six mile limitation and excluding all outsiders? If appellees' conversion was genuine, why is intra-state commerce still excluded? Why the discrimination?

The answer is that an actual controversy still exists between the parties.

We submit that a dismissal of the appeal would make a mockery out of the law and inflict a great injustice upon the appellant.

We submit that the motion to dismiss should be denied.

Respectfully submitted,

CLAUDE D. STOUT,
Milton, Wisconsin,
Attorney for Appellant,

GEORGE S. GEFFS,
JACOB GEFFS,
ELI BLOCK, of
McGOWAN, GEFFS, GEFFS & BLOCK,
Janesville, Wisconsin,
Of Counsel.